No. 5900

# United States Circuit Court of Appeals

## For The Ninth Circuit

GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a corporation,

*Appellant*,

—v.—

JOHN SKANSI,

*Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

## BRIEF OF APPELLANT

COSGROVE & TERHUNE,
*Attorneys for Appellant.*
2002 Smith Tower, Seattle, Washington.

THE ARGUS PRESS—SEATTLE

No. 5900

# United States Circuit Court of Appeals

## For The Ninth Circuit

GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a corporation,

*Appellant,*

—v.—

JOHN SKANSI,

*Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

## BRIEF OF APPELLANT

COSGROVE & TERHUNE,
*Attorneys for Appellant.*
2002 Smith Tower, Seattle, Washington.

THE ARGUS PRESS—SEATTLE

INDEX

## LIST OF CASES



## AUTHORITIES

# United States
# Circuit Court of Appeals
## For The Ninth Circuit

| | |
|---|---|
| GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a corporation, *Appellant*, —v.— JOHN SKANSI, *Appellee*. | No. 5900 |

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

## BRIEF OF APPELLANT

### STATEMENT OF THE CASE

Briefly—the cause of action herein was to reform a marine insurance policy, upon the ground of an alleged mistake, in the naming of the beneficiary, and to recover upon the policy so reformed.

The GLOBE AND RUTGERS FIRE INSURANCE COMPANY, (appellant), hereinafter called the "Insurance Company", was a corporation of New York, authorized to write insurance in the State of Washington, and at the times in question was doing business at Seattle through its duly licensed corporate agent, Burgard, Sargent, Inc., the latter operating under active charge and management of C. P. Sargent.

The A. & P. PRODUCTS CORPORATION, a corporation of New York, with offices in Seattle, was engaged in the business of fishing and the packing of fish, and owned and operated a large number of fishing vessels and cannery tenders (Ap. 65).

WILBUR E. DOW, at the time of the trial of this case, had been in the marine insurance business in Seattle for fifteen or twenty years, and for the five years immediately preceding such trial, his business was conducted as a corporation known as Wilbur E. Dow & Co. In addition to the marine insurance business, Dow and his corporation did some customs house business and the documentation of vessels. He was not a licensed broker and had no license or authority to do any business for the Insurance Company (Ap. 65-67). For brevity, we will speak of Dow and his corporation as "Dow."

The A. & P. Products Corporation purchased insurance upon its fleet annually. In 1924, Dow had the placing of it, and we find him writing Burgard, Sargent, Inc., on January 30, 1924 (Appellant's Exhibit 12, Ap. 89):

> "We are very much interested in covering seven or more pieces of marine property now located in the north for a new but very responsible fish packing corporation, and we would appreciate a personal call from you as early as possible in order that we may go over the details, and if possible cover this property."

On February 7, 1924, he again wrote Burgard, Sargent, Inc. (Appellant's Exhibit 13, Ap. 89), "re mar-

ine hull insurance, the A. & P. Products Corporation," reading:

> "We understand that the various marine hull insurance companies have entered into an agreement as to rate covering fleet hull policies. We represent the A. & P. Products Corporation, who now have six marine policies written through us; * * * This company have other vessels, both gas and Diesel, and which vessels we will shortly cover with full marine insurance.
>
> "Will you please indicate to us by letter just what fleet rate your people will be willing to give the A. & P. Products Corporation at the expiration of the current policies now in force * * *"

On March 4, 1924, Dow again wrote Burgard, Sargent, Inc., returning covering notes on the vessels of the A. & P. Products Corporation (Appellant's Exhibit 14, Ap. 90), saying:

> "We regret exceedingly, after all our efforts, that we could not swing the fleet of the A. & P. Products Corporation, but we will continue to work together in every possible manner and perhaps later on the situation will clear up."

Dow testified:

> "The determination of the agent who received the business or of the company who received the business was left to me invariably. I could place the insurance with Mr. Frederick's company or with Mr. Hutchinson, representing the Yangtsze, or I could put it with Mr. Sargent, or with any one of a number of different agencies in the city, invariably. * * * and the policies

for the year 1924 on this same fleet of vessels were written through the agency of Frank Frederick but handled through me. I peddled it out to Frank Frederick." (Ap. 67)

In 1925, Dow called Sargent and had him come over to his office, and gave him a list of all the vessels owned by the A. & P. Products Corporation (Ap 59), and asked him for a rate. He testified:

"I could not place this particular insurance at any old rates or any old conditions. I had to submit a proposition. There was a contest on here in Seattle at the time between various agents for the writing of that business. Frank Frederick, representing other companies, was contesting for the business and the rate was being cut down from day to day between these companies. Frederick would offer one rate; Sargent would offer another. Some of these offers were made to me and Frederick went direct *to my clients.*" (Ap. 66)

First it was given to Sargent at 6%, then Frederick offered it at 5½%, whereupon Dow went back to Sargent and gave the business to him, upon the latter meeting the rate (Ap. 70). The A. & P. Products Corporation was indifferent as to the agency he placed the business with, and left the matter to his judgment as long as the rates and terms were satisfactory:

"I placed this fleet insurance, including the 'Companion', with Sargent in 1925. I collected the premium from the A. & P. Products Corpor-

ation and passed it along to Burgard, Sargent & Company, deducting 10% for myself." (Ap. 69)

Dow had handled some of Skansi's marine insurance business since 1914 or 1915, but

> "When I handled his marine insurance business, he did not tell me with what insurance company to place it; it was left to me to determine where it should be placed, assuming that the rates were equal." (Ap. 67)

NEGOTIATIONS FOR "COMPANION" INSURANCE—EVIDENCED BY CORRESPONDENCE—NO REFERENCE TO JOHN SKANSI THEREIN.

Appellant's Exhibits 1 to 6, inclusive, are the original negotiations (merged in writing), for the issuance of the A. & P. Products Corporation fleet insurance upon the "Companion."

*Exhibit 1* is appellant's cover note of March 6, 1925, insuring the "Companion." It is issued to and signed by the A. & P. Products Corporation (Ap. 66-71).

*Exhibit 2* is a letter of Dow to Burgard, Sargent, Inc., dated March 6, 1925, headed: "Re fleet of the A. & P. Products Corporation", and directing the renewal of the entire fleet insurance (Ap. 72).

*Exhibit 3* is a letter dated March 7, 1925, from Burgard, Sargent, Inc. to Dow, "Re A. & P. Products Corporation", and making delivery of policies on vessels of that corporation, including the "Companion" (Ap. 72).

*Exhibit 4* is a letter from Burgard, Sargent, Inc. to Dow, dated March 11, 1925, "Account A. & P. Prod-

ucts Corporation," acknowledging receipt of the policies mentioned in appellant's Exhibit 3 (Ap. 72).

*Exhibit 5* is Dow's letter to Burgard, Sargent, Inc., dated March 11, 1925, "Re Gas Screw' "Companion," account A. & P. Products Corporation", acknowledging covering note of March 6th, etc. (Ap. 73).

*Exhibit 6* is a letter from Dow to Burgard, Sargent, Inc., dated March 18, 1925, giving notice that the "Companion" went into commission, and would clear for the north that evening (Ap. 73).

---

DESCRIPTION OF POLICY—NAME OF ASSURED—TRADING LIMITS WARRANTY.

(a) The policy was written naming the A. & P. Products Corporation as the assured, with "loss payable to assured, or order" (Ap. 9).

(b) It had a typewritten marginal endorsement, fixing and warranting the trading limits, reading as follows:

> "Warranted confined during the currency of this policy to the waters of Southeastern Alaska, not north of Skagway nor west of Cape Spencer, with privilege of making one round trip between Seattle, Wash., and policy limits." (Ap. 18)

---

OCTOBER 19, 1925 CHANGE IN TRADING LIMITS WARRANTY.

On this date the warranty was changed to read as follows:

> "It is hereby understood and agreed that the warranty under the within policy is changed to read as follows:
>
> 'Warranted during the currency of this

policy to be employed as a cannery tender or a fishing vessel, and to be operated in the waters of Puget Sound, British Columbia, Southeastern Alaska, not north of Skagway or west of Cape Spencer. *All other terms and conditions remaining unchanged.*' " (Ap. 74-75)

The negotiations leading to this change are evidenced by appellant's Exhibits 8, 9 and 10—correspondence between Dow and Sargent.

*Exhibit 8* is a letter dated October 19, 1925, from Dow to Burgard, Sargent, Inc., asking approval of an enclosed suggested endorsement extending the trading limits to Puget Sound.

*Exhibit 9* is Burgard, Sargent, Inc. answer of the same date, returning the requested endorsement, with a suggestion of further change (Ap. 76).

*Exhibit 10* is a letter from Dow to Burgard, Sargent, Inc., dated October 20, 1925, transmitting a copy of the October 19th trading limits warranty, which was by Dow actually attached to the policy as hereinbefore set forth (Ap. 76).

From the foregoing we observe that Dow drafted the October 19th endorsement; that there was no charge, premium or consideration for this endorsement; and that John Skansi's name cannot be found in Dow's proposed endorsement or the one which was actually attached to the policy, or in any of the letters relating thereto.

## Appellee's Claim of Mistake, as per Complaint

Although John Skansi's name does not appear in the policy, nevertheless he brings this action seeking

to recover thereunder for an alleged loss of said vessel, after first making himself the beneficiary under said policy through its reformation, on the ground of a mistake—by the defendant. We quote from Paragraphs III, IV, V, VI and VII of his amended complaint (Ap. 3, 4, 5, 6):

III

"That in the 17th day of February, 1925, plaintiff, John Skansi, entered in to a charter-party by which he chartered and hired to A. & P. Products Corporation, said gas vessel 'Companion' by the terms of which said A. & P. Products Corporation hired and chartered said vessel until September 15th, 1925, a copy of which said charter-party is hereto attached, marked Exhibit 'A' and made a part of this complaint by reference; that on March 16th, 1925, while said charter party was in full force and effect, defendant issued to said A. & P. Products Corporation and John Skansi its certain policy of insurance, a copy of which is attached hereto, marked Exhibit 'B' and made a part of this complaint by reference; that by said policy of insurance said parties were insured against certain hazards, among others being that of fire, in the sum of $11,300.00, as will more fully appear from said policy of insurance, and said parties paid to defendant the required necessary premiums to continue and keep said policy of insurance in force until the 16th day of March, 1926.

IV.

"That at all time during negotiations with ref-

erence to the procuring of the policy of insurance hereinbefore referred to, and at the time of the issuance of said policy, the defendant knew that the owner of said gas vessel was the plaintiff, John Skansi, and that the interest of the said A. & P. Products Corporation was that of a charterer only, and was fully advised and informed that it was the desire and intention of the plaintiff, John Skansi, and the said A. & P. Products Corporation that their respective interests should be protected by said policy, and that said policy should be written and issued in such form as to protect the respective interests of both of said parties, and said defendant was further advised and informed that it was the desire of the plaintiff, John Skansi, that such policy should also cover fishing operations in the waters of Puget Sound so that the said plaintiff, John Skansi, would be protected in fishing said vessel in such waters subsequent to the expiration of his charter with said A. & P. Products Corporation, should he desire to do so.

V.

"That on or about the 19th day of October, 1925, the plaintiff, John Skansi informed the defendant through its duly authorized and acting agents, Burgard-Sargent & Co., Inc., that his charter with the A. & P. Products Corporation had terminated, and that said vessel had been returned to the waters of Puget Sound, and that it was his desire and intention to use and operate said vessel for fishing purposes in the waters of

Puget Sound, and then and there requested the defendant so to change and modify its said policy that he, the said John Skansi, would be insured and covered under the terms thereof while operating said gas vessel 'Companion' as a cannery tender and fishing vessel in the said waters of Puget Sound.

VI.

"That the defendant at the time of the request for the modification of said policy as aforesaid, admitted its agreement to modify said policy as aforesaid, and then and thereupon agreed so to do and agreed that said policy should be made to insure the interests, cover the operations of the plaintiff, John Skansi, in the waters of Puget Sound during the remainder of the term of said policy, and agreed forthwith to issue a rider to said policy embodying the agreement between said parties as aforesaid.

VII.

"That notwithstanding the knowledge and agreements of the defendant as aforesaid, said defendant at the time of the issuance of the rider to said policy hereinabove referred to, by oversight, inadvertence and mistake as plaintiffs believe, failed and neglected to describe the plaintiff, John Skansi, as the beneficiary under said policy, although it was the intention of the plaintiff and said defendant that he should be described as beneficiary thereunder, as his respective interest should appear.'

The prayer is that the policy and the endorsement

"be reformed to cover the interest of John Skansi in said gas vessel 'Companion' at the time of said loss", and for judgment, etc. (Ap. 5).

### Appellant's Denials—Per Answer

Appellant answered, admitting that on March 16, 1925, it issued to the A. & P. Products Corporation its policy of insurance, a copy of which was attached to appellee's amended complaint and marked Exhibit "B"; admitted that it issued the endorsement of October 19, 1925, to the A. & P. Products Corporation, and made general and specific denials, including the following:

VI.

> "Answering Paragraph VII of said amended complaint, said defendant denies each and every allegation therein contained, and particularly does it deny that it was the understanding and agreement of the defendant that said insurance was for or on account of John Skansie, or to cover any interest of John Skansie, or that he should be described in said policy as a beneficiary thereunder as his interests might appear, or otherwise. It is further particularly denied that at the time of the issuance of the policy, or at the time of the issuance of said endorsement of October 19, 1925, the said John Skansie was not named as a beneficiary under said policy through oversight, inadvertence and mistake. Defendants on the contrary allege that said original policy and its endorsements were intended to be

and were written to cover no interest of the said John Skansie." (Ap. 31)

---

AT CLOSE OF APPELLEE'S CASE—

APPELLANT RENEWED MOTIONS AGAINST TESTIMONY, AND MOVED FOR A DISMISSAL, CHALLENGING THE SUFFICIENCY OF THE EVIDENCE.—RULINGS.

From the very beginning of the trial until appellee rested, the appellant made objections to the testimony of the witnesses, Dow and John Skansi, particularly that which related conversations between them. One of the grounds was that Dow was the agent of the assured, and not the agent of the insurer, and therefore his testimony was hearsay. These objections, and a motion to strike such testimony were renewed upon the resting of appellee, and denied, the court saying:

> "All motions denied. The law is, as the Court understands it, that when you debauch another man's agent, the other man's agent ceases to be the agent of the other man, and becomes your agent. Now, if Dow's testimony is true that Sargent did not leave him as a free agent in the interests of his clients, but held a club over him, and coerced him, or used undue influence to get him to accede to the terms proposed by Sargent, right there he ceased to be the agent of his clients when he yielded to that, and became the agent of Sargent, and Sargent's client."

To these rulings and decision of the court, exceptions were taken and allowed (Ap. 84-85).

TESTIMONY OF SARGENT AND BURCKHARDT FOR APPELLANT

Sargent, in support of the allegations of appellant's answer, specifically denied any mistake in the execution of the policy or the October 19th endorsement; that the negotiations for the issuance of the policy did not make mention of John Skansi; that he did not know John Skansi was the owner of the vessel; that there never was any request to change the name of the assured to John Skansi (Ap. 86-104); that

> "There was no arrangement made with me regarding the writing of this policy in the name of John Skansi. The whole contract was to the effect that we were to write the fleet of the vessels owned by the A. & P. Products Corporation." (Ap. 86-87)
>
> "I did not know that this vessel was the vessel of John Skansi." (Ap. 86)

He further said that if Dow had told him that John Skansi was the owner, the wording of the policy would have been different.

> "We would have written it in the name of the owner, and the name of the charterers, with loss, if any, payable as their respective interests may appear." (Ap. 87)
>
> "It is the practice among underwriters in Seattle, and vicinity, when writing insurance on vessels under charter, to name the owner of the vessel and the charterers." (Ap. 86)
>
> "Just preceding October 19th, if a request had been made to me then to change the policy to make John Skansi the beneficiary or the assured,

there might have been some difficulties in the way of acceding to that request. For illustration, when we have a boat individually owned, we always want to make an investigation of the owner, and I did not know Mr. Skansi, and I would have wanted to investigate it, and besides I found out since that Mr. Skansi is an Austrian. While I am not saying anything against Mr. Skansi, because I don't know anything about it, still at that time companies were very particular about writing insurance on vessels owned by Austrians." (Ap. 104)

"There is a difference between a fleet rate and an individually owned vessel rate." (Ap. 105)

"If he had told me that John Skansi was the owner and the A. & P. Products Corporation was the charterer, that would not have made any difference in the rate as to this particular vessel." (Ap. 87)

He further said that the policy was

"drawn up in strict accord with the arrangement or contract we had with Mr. Dow during the early spring of 1925. The endorsement of October 19th agrees with the arrangement we had with Mr. Dow. In our efforts to get this 1925 fleet insurance, there was no one else, so far as I know, representing the defendant, or Burgard & Sargent, trying to get this insurance. I know Mr. Charles Burckhardt, but he did not have anything to do with the procurement or attempted procurement of this fleet insurance in 1925." (Ap. 91)

Burckhardt testified that he was President and General Manager of the Alaska Consolidated Canneries, the Independent Navigation Company, and the Lake Washington Shipping Yards; that the Consolidated was his principal business in 1925; in that year he was President of Burgard, Sargent, Inc. until June, when the business was sold out; that he had only one-tenth interest in the company, and its nominal head; that the active management of the business was in the hands of Mr. Sargent; that he knew Dow, who had handled the customs business of the Alaska Consolidated Canneries in 1924, 1925 and 1926, up to and including the time of trial; that Burgard, Sargent, Inc. had no customs business. Dow had written some marine insurance on some of his chartered boats. It was not placed with the Globe and Rutgers Fire Insurance Company, nor with Burgard, Sargent, Inc.

There was read to him the testimony of Dow, as follows:

> "A. Mr. C. A. Burckhardt was one of the principal owners of the Globe & Rutgers Insurance Company, which, through the agency of C. A. Burckhardt, who was the president and principal owner of the insurance agency of Burgard-Sargent & Company, which I was attempting to buy at one time, he called me over and said, 'I am operating seven canneries, and you have to do some business with my companies, or I will take the business away from you,' meaning the customs-house business." (Ap. 93)

To this Burckhardt replied:

> "I never made any such statement to Mr. Dow,

or any statement of like effect or like tenor. As a matter of fact, he has had our business continuously from 1924 when he went into business, until this date. I did not have any conversation with Mr. Dow in connection with the A. & P. Products Corporation fleet insurance in 1925. I didn't know that Burgard, Sargent & Company wrote the business. The first time I knew it was this morning when you spoke to me about this case. The first time I heard about this case was last evening when you phoned me to come over here as a witness, and then I thought it was some other company. This is the first time I ever heard of the 1925 fleet insurance of the A. & P. Products Corporation." (Ap. 93-94)

On cross examination he testified:

"Q. You have discussed business matters at different times with Mr. Dow regarding this business generally, have you not?

A: Oh, yes, we have had some general discussions.

Q: And you had some general discussions about the matter, like all men have, of reciprocity in business.

A: Yes, sir.

Q: And no doubt there was something said about exchanging business in those times?

A: I recall very distinctly when Mr. Dow came down to see me the first time, and starting in business for himself. This company was formerly the Roberts, Burckhardt Company, and afterwards changed to the Burgard-Sargent

Company, and Frank P. Dow & Company always gave some insurance business to the Roberts-Burckhardt Company. It was not much, but always some. So when Mr. Dow came down and asked me, saying he was going in business for himself, and also said he would be able to give the Roberts-Burckhardt Company some insurance business in reciprocity. And of course I appreciated that, but I never knew just how much he gave to them. I knew that he gave them some.

Q: But there was a general understanding that he was doing business together?

A: Oh, his business, his customs business did not depend upon that, because I do not allow the business of the cannery company at no time to interfere with that insurance company. I could not allow them to.

Q: But you had discussed the matter of reciprocity in your dealings together?

A: Oh, yes.

Q: Drawing insurance business to your company in connection with the brokerage business?

A: Yes.

Q: You did not pay any attention or take any active part in this business, I understand?

A. No, sir.

THE COURT: I don't understand that question. tion.

MR. PETERSON: He did not take any active part in the insurance business.

Q: You were acquainted with the A. & P.

Products Corporation and operations, Mr. Burckhardt?

A: Yes, in a general way.

Q: You know, of course, that they did not operate on the Sound; that they operated in Alaska?

A: As far as I knew that was the only place they were operating was throughout Alaska; I think at that time only in Southeastern Alaska.

Q: And that was the situation in 1925?

A. As far as I can recall." (Ap. 94-95)

We apologize for quoting so much of this testimony, but in view of the court's particular comments relative to the same, we find it necessary to set it out in full.

---

DOW'S BOOKKEEPER

Mrs. Jacobson, bookkeeper and stenographer for Dow, was introduced by appellee in rebuttal, to testify that John Skansi and his brother, Nick, called in September or October and talked to Dow, who called Sargent on the phone, but she did not hear the conversation; that

"Mr. Nick Skansi came into the office and wanted an endorsement on the policy as they were using this boat themselves; the A. & P. Products Corporation had finished with the boat, and according to the policy it stated to be used as a cannery tender in Southeastern Alaska, and they were using it fishing in Puget Sound."

"Mr. Sargent said that he would give us an endorsement covering the—that is about all that

was said. Mr. Sargent said that Mr. Skansi could operate the boat and that he would have the endorsement over there very shortly." (Ap. 96)

On cross examination she said:

"When John and Nick Skansi came in they said that they had come in respect to an endorsement. I turned them over to Mr. Dow. A few days later, at the next conversation, Nick Skansi came in alone and said that he had not received an endorsement to operate on Puget Sound, that his policy stated that the boat was covered for operating in Southeastern Alaska and he wanted it changed so that it would cover operations in Puget Sound. I don't remember him saying anything about changing it further." (Ap. 97)

"I examined our office copy of the policy. At the time the policy was made out I knew that it was made out to the A. & P. Products Corporation. I don't recollect anything being said either by myself or Nick Skansi concerning the name of the assured at the time he made his call. We were mainly taking up the trading limits." (Ap. 98)

"I don't remember asking Mr. Sargent for any changes in the policy after October 19th. I only recollect one conversation with Mr. Sargent in connection with this matter. It was over the telephone." (Ap. 99)

---

SARGENT'S FURTHER DENIALS

He stated that Mrs. Jacobson was mistaken about

having any conversation with him about John Skansi desiring the policy changed, and specifically denied having any telephone conversations with her "in connection with this matter prior to the October 19th endorsement" (Ap. 108).

JOHN SKANSI—IN REBUTTAL

He claimed to have been in Dow's office on September 20, 1925, calling upon Miss Brown (Mrs. Jacobson) relative to the endorsement on the "Companion" policy; that she called up on the telephone for a person named Sargent and explained what he wanted. He said he saw the policy before he started out for Alaska, but

> "She told me when the boat came back from Alaska that the policy is made for Alaska and I have to have endorsement. This is when I first saw the policy. I did not examine it myself. I got my information from her that it was not good for Puget Sound and I know myself because I have been doing that for years." (Ap. 110)

He talked to Dow just before October 19th in the latter's office.

> "I asked for an endorsement so I could go fishing on Puget Sound." (Ap. 111)

He looked at the policy before it was endorsed, and observed that his name was not in it.

---

IMPEACHMENT OF SARGENT?

Mitchell Skansi and Nick Skansi, appellee's cousin and brother, after the claim of John Skansi had been rejected by the Insurance Company, called upon Sargent at the latter's office in Seattle, in 1926. Mitchell

Skansi testified concerning the conversation there had, as follows:

"Q. I will ask you whether or not in that conversation he said to you, in substance, that he had always known that John Skansi was the owner of that boat?

A. Yes, I asked him.

Q. But somehow or some way or other he was not mentioned in the policy, or words to that effect?

A. It was this way, I came on purpose with Mr. Nick Skansi, and introduced Mr. Nick Skansi to Mr. Sargent. He was all bruised up yet from the fire, burned, and I told him that this is the man that almost burned up in the boat, and I asked him what he intends to do with that. 'Well,' he said, 'It is kind of a hard thing to say,' he said, 'The boat did not belong to the A. & P. Products Corporation, but belonged to John Skansi,' and he said, 'Someway or other John Skansi did not appear on the policy,' and he said, 'I cannot pay this, I can't pay it, but if I had all to say about it, I would pay that quick (snapping fingers) just that way. And I said, 'You always knowed that John Skansi owned that boat?' And he said, 'Yes, sir, I knowed it all the time.' "

On cross examination he said:

"Q. Just a minute, did he tell you that he knew that John Skansi was the owner when he contracted with Dow, in the spring of 1925, for the policy?

A. He didn't say.

Q. Did he tell you that?

A. He didn't say exactly that way. He said he knowed all the time that John was the owner.

Q. What did he mean, 'all the time?'

A. Well, I asked him if he knowed that John was the owner of the boat, and he said, 'Yes, I knowed it all of the time,' but he blamed the A. & P. Products Corporation for not putting his name in, or something. He said some way or other his name did not appear there. He said, 'I would have paid if I had all to say about it that quick,' he said, 'but my home office won't let me do it.' That is what he told me. And he told me that also in my office in the Harbor." (Ap. 105-106-107)

Nick Skansi gave his version of the conversation:

"I was present with Mitchell Skansi in Mr. Sargent's office early in the year 1926, in connection with this insurance. A conversation took place regarding this insurance on the 'Companion.' Mr. Sargent said 'In some way or other, John's name did not appear in this policy, and he said the company won't pay him because his name is not mentioned there,' and he said, 'They won't pay the A. & P. Products Corporation, because they are not the owner of the "Companion".' And Mitchell said to Mr. Sargent, 'But you know John was the owner of the "Companion".' And Mr. Sargent said, 'Yes, I knowed all the time.' And Mitchell said, 'What is stopping it?' And he said, 'Well, if I got all to say, I would

pay John that quick, but my company stopped me."

On cross examination he testified:

"I am a brother of John Skansi. Mitchell Skansi is our cousin.

Q. You say that Mr. Sargent told you that some way or other John Skansi's name did not appear on the policy?

A. That is what he said.

He did not say why. He did not say that anybody had ever asked him to put John Skansi's name in the policy. We did not ask him such a question. Neither Mitchell nor I when we were in the office of Mr. Sargent did not ask him why the policy did not contain the name of John Skansi." (Ap. 107-108)

SARGENT DENIES MITCHELL AND NICK SKANSIS' TESTIMONY

The conversations related by Mitchell and Nick Skansi in rebuttal were specifically denied by Sargent (Ap. 108).

---

JOHN SKANSI IN ADDITIONAL REBUTTAL

Skansi said he talked to Dow at his office just before October 19th, and asked for an endorsement so that he could go fishing on Puget Sound.

"Q. Did you say you wanted it fixed up so that it would take your name in too; did you ask for that?

A. No.

Q. You did not ask for that. Did you ask Dow

to have it changed so that it would have your name in it?

A. Well, I asked what I wanted the endorsement on that policy to cover the boat on Puget Sound.

Q. Yes, but did you ask him to have your name put in it?

A. Yes, sir.

Q. How did you know it was not in it?

A. Because I seen it was not, I seen it once before, before I took the endorsement.

Q. But you just got through saying you had not seen it?

A. Well, I did not read it through.

Q. Well, you looked at it long enough to see whether your name was in it, didn't you?

A. I seen the name was not in it." (Ap. 111)

---

CHALLENGE AND MOTION FOR DISMISSAL—MEMORANDUM DECISION

At the close of the trial of the issue of mistake and reformation, the appellant challenged the sufficiency of the evidence and moved for a dismissal (Ap. 112). The matter was taken under advisement, and the court, on December 20, 1928, filed its memorandum opinion denying the motion (Ap. 39), saying:

> "The evidence shows that Burgard, Sargent, Inc., was the agent of the defendant. It shows that the plaintiff dealt directly with the witness Dow of Wilbur E. Dow, Co., Inc., hereinafter designated as The Dow Company.
>
> "The preponderance of the evidence shows that

Dow knew that plaintiff had long been the owner of the vessel; that plaintiff, in effect, requested Dow to have the policy fixed so he could use the vessel on Puget Sound; that Dow understood that to do this would require a rider naming the plaintiff as the assured and a change in the description of the waters in which the boat was to operate and that Dow told plaintiff that such change would be made. It is also shown that Dow thought, after conversation with Sargent of Burgard, Sargent, Inc., the changes had been made. Sargent appears to have had the active management of at least the details of the Insurance business of his company. As between Dow and Sargent the question is, who made the mistake in not changing the policy to name the plaintiff as the assured. If it was Sargent's mistake, no question is made but that the policy should be reformed, but defendant claims that the mistake was solely that of Dow; that he never asked Sargent to change the name of the assured and that Sargent never promised to do so.

"Plaintiff also contends that in this matter Dow was defendant's agent. If he was, the policy should be reformed. Until the latter issue is determined it is not necessary to consider other matters which have been discussed.

"The evidence shows that at the time this policy of insurance was written and prior thereto there was keen competition among those writing insurance and that rates were being cut. It is shown that The Dow Company was in the Custom

House Brokerage business as well as that of securing insurance; that C. A. Burckhardt, the President of Burgard, Sargent, Inc.. had interests that placed in his control or at his disposition certain custom house brokerage business; that The Dow Company handled this business from 1924 to the date of trial. Dow appears to have controlled the disposition, for the year 1925, of the insurance of the fishing fleet of the A. & P. Products Corporation. Dow testifies that Burckhardt told him, Dow, in effect, that unless Burgard, Sargent, Inc., got the insurance of this fleet he would take this custom-house business away from the Dow Company. The Court is asked to reject this testimony because of what are termed Burckhardt's 'flat and unequivocal denials' of it.

"It is true that Burckhardt first testified that he made no such statement to Dow as that he would take from the latter this custom-house business unless Burgard, Sargent, Inc., got the insurance but later in his examination he stated that he talked with Dow about reciprocity.

"There has been no claim in this case that he referred to aught else than Dow's delivery of insurance to Burgard, Sargent, Inc., and Burckhardt's delivery of custom-house brokerage business to The Dow Company. Burckhardt nowhere denies that he was the one who broached this subject. If The Dow Company was, as contended by the defendant, an insurance broker, acting as agent of the plaintiff and not as agent of the defendant, this inducement held out by

Burckhardt to influence The Dow Company in placing this insurance, was sufficient to make The Dow Company the employee or instrument of Burgard, Sargent, Inc., and through that company of the defendant. The softened phrase in nowise changes the essence of this transaction." (Ap. 43-44-45)

INTERLOCUTORY DECREE DENYING CHALLENGE AND MOTION

On February 11, 1929, the court denied appellant's challenge to the sufficiency of the evidence and its motion for dismissal, and it was ordered that the policy of insurance "be and the same is hereby reformed, making the plaintiff, John Skansi, the assured under said policy prior to and at the time of the destruction of the 'Companion' December 30, 1925." To the ruling and the interlocutory decree exceptions were taken and allowed.

AFFIRMATIVE DEFENSE

To the complaint, the appellant interposed an affirmative defense setting up the unseaworthiness of the vessel, with the privity and knowledge of the owner at the time of sailing, which was separately tried, at the close of which the appellant again challenged the sufficiency of the evidence and moved for a dismissal (Ap. 134). The matter was taken under advisement, and a final decree entered on June 25, 1929, re-affirming the interlocutory decree of February 11, 1929, and decreeing a recovery to said appellee from the said appellant upon said policy of insurance, to which exceptions were duly taken (Ap. 51).

NOTICE OF APPEAL

The Insurance Company appealed from the decree (including the interlocutory decree) and the rulings of the court theretofore entered in the trial of said cause (Ap. 136).

## ASSIGNMENTS OF ERROR

### I.

Upon the trial of said cause by the above entitled court, the defendant, at the close of plaintiff's case, challenged the sufficiency of the evidence and moved the court for a dismissal of said action. The motion was denied and an exception taken, which ruling is hereby assigned as error.

The evidence was insufficient for the following reasons:

(a) Plaintiff failed to prove any agreement on the part of the defendant (prior to the issuance of the said policy on March 16, 1925), to execute and issue a policy describing John Skansi therein as a beneficiary thereunder, or to insure any interest of John Skansi in and to said vessel (if any he had).

(b) Plaintiff failed to prove any agreement on the part of the defendant to make the October 19, 1925, endorsement describe John Skansi as a beneficiary under said policy, or to insure any interest of John Skansi in and to said vessel (if any he had).

(c) Plaintiff failed to prove any mistake, inadvertence or oversight in the drafting or execution of the policy of insurance as written and issued on March 16, 1925.

(d) Plaintiff failed to prove any mistake, inadvertence or oversight in the drafting or execution of the October 19, 1925, endorsement.

### II.

Upon the trial of said cause by the above-entitled court, the defendant, at the close of the trial (exclu-

sive of the hearing upon the affirmative defense) challenged the sufficiency of the evidence and moved the court for a dismissal of said action. The motion was denied and an exception taken, which ruling is hereby assigned as error.

The evidence was insufficient for the same reasons heretofore given in support of Assignment of Error No. 1.

III.

On February 11, 1929, the Court entered herein its interlocutory decree declaring a reformation of said policy of insurance, making the plaintiff, John Skansi, an assured under said policy "prior to and at the time of the destruction of 'Companion' December 30, 1925." The evidence being insufficient as hereinbefore stated, and the defendant duly excepting, said ruling and decree is assigned as error.

IV.

At the close of the trial of said cause (including the affirmative defense) the said defendant challenged the sufficiency of the evidence and moved for a dismissal of the cause. The motion was denied and an exception taken, and the defendant now assigns said ruling as error. The evidence was insufficient for the same reasons hereinbefore given in support of Assignment of Error No. I.

V.

On June 25, 1929, the Court entered herein its final decree confirming said interlocutory decree, and entering up a money judgment in favor of said plaintiff and against the said defendant. Defendant duly ex-

cepting, now assigns said ruling and decree as error, the reasons therefor being those hereinbefore given in support of Assignment of Error No. I.

## ARGUMENT

### Reformation For Mistake—Upon What Terms and Conditions

In the case of

*Hearne v. Marine Ins. Co.*, 87 U. S. 488; 22 L. Ed. 395,

we find an action to reform a contract of marine insurance. The plaintiff made application by letter to the underwriter for insurance, giving directions to cover the vessel from "Liverpool to Cuba and load for Europe." The isurance company replied, announcing that it had entered insurance on this vessel, Liverpool to port in Cuba, and thence, etc. The policy was made out and described the voyage "at and from Liverpool to port in Cuba, and at and thence, etc." It was delivered to the assured and received without objection. The vessel was loaded and proceeded to a port in Cuba. She went thence to another port in Cuba, and later sailed for Europe and was lost at sea. The insurance company refused to pay, upon the ground that the voyage from the first to the second port in Cuba was a deviation and put an end to the liability of the assurer. The court held:

"Although for fraud or mistake a written

contract might be reformed, the party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that they both have done what neither intended, and a mistake on one side may be ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

In the case of

*Bartelme v. Merced Irrigation District*, 31 Fed. (2nd) 10 (13) 9th Cir.,

this court had for consideration an application for reformation, the claim being made that there was omitted from the instrument in question a certain portion of the agreement of the parties, and that one of the parties would not perform according to the terms of the omitted portion. Reformation and specific performance was sought. The court found:

"* * * it is clear from the evidence that all mention thereof was omitted from the written contract with the knowledge and the consent of the parties thereto. Power to reform instruments for fraud or mistake is universally conceded to courts of equity, but a court of equity has no power to reform a contract, so as to insert in it a provision which the contracting parties never intended it to contain. It can go no fur-

ther than to make the contract express the true intention of the parties as to its provisions. In other words, it can make the contract only what the parties intended it to be. 'Neither will the court insert a provision which was omitted with the consent of the party asking the reformation, although such consent was given in reliance on an oral promise of the other party that the omission should not make any difference.' (Citations) If a clause which the petitioner claims should have been inserted in the contract is not one which the parties agreed on, and omitted through mistake, but merely one which ought as a matter of propriety be inserted, a court of chancery will not interfere, it not being within its province to make or ameliorate contracts for parties."

In the case of

*Gaunt v. Vance Lumber Co.*, 31 Fed. (2) 503; 9th Cir.,

we find the Vance Lumber Company, owner of large tracts of timber land, etc., desired to sell and negotiated a sale with a broker, plaintiff's deceased husband. The court was asked to reform a writing and plat describing said lands by way of adding thereto the description of certain cut-over lands which were not mentioned and were in fact sold without reference to the broker. Suit was brought to reform and to collect the commissions on sale of the cut-over lands, the broker alleging that the agreement, through mutual mistake and the inadvertance of both parties, or the mistake and inadvertance of the complainant

and the fraud of the defendant, the description was left inadequate and incomplete; therefore, the complainant cannot enforce said contract of employment and recover the full amount of her commission now due. The lower court held that there was no mutual mistake, and that the minds of the parties did not meet upon the letter and the map. On appeal this court said:

> "It is to be inferred that both parties in good faith believed it (the writing) to be sufficient, and the mistake was the mistake in judgment as to its legal sufficiency, but if it be conceded that in exceptional cases a mistaken view of the law may afford a basis for reformation, this cannot be held to be such a case without in effect rendering the statute a fraud nugatory. In all cases of attempted agreements in writing, presumably both parties intended to enter into a valid binding contract, and if such intention is the only requisite basis to warrant the reception of oral testimony touching the nature and scope and terms of the intended agreement, reformation would be possible in any case. Parties might in good faith believe that a written memorandum given by one to the other is sufficient in law even though unsigned by either, but they might both fully intend that such a memorandum should constitute a binding agreement, but in such a case for a court of equity to require a party to attach his signature would operate to abrogate the statute."

In the case of

*Harrison v. Hartford Fire Ins. Co.*, 30 Fed. 862,

the court held that if the testimony is conflicting or of such indecisive character as to raise a substantial doubt in the minds of the court, the contract as written must stand.

In the case of *Firemans' Insurance Co. v. Brooks*, 19 Fed. (2) 277, a policy was issued to one Brooks with a "sole owner" clause in it. Suit was brought after loss to reform the policy so as to include the name of his wife as one of the owners. It was held that the court would not insert the joint owner's name in the fire insurance policy after the fire, unless the mistake in omission was mutual.

Chief Justice Fuller in *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; 35 L. Ed. 1063, held that:

> "To justify a reformation, the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court."
>
> "Where the proof is confused, conflicting and contradictory, relief will not be granted except the mistake appear clearly and positively in spite of the conflict, and justice requires correction."
>
> 34 Cyc. 988
>
> *Baldwin v. Nat'l. Hedge, etc.*, 73 Fed. 574.

ORIGINAL POLICY WAS DRAWN PER AGREEMENT—NO MISTAKE

The Dow and Sargent negotiations, consisting of about three conversations in February or early March, 1925 (Ap. 79), and merged into the correspondence

between them (Appellant's Exhibits E-1 to 6, inc. hereinbefore referred to), show the A. & P. Products Corporation making direct request for insurance, the issuance of a cover note on March 6th, the issuance of a further policy of insurance, for which was substituted on March 21st the policy in question. Every letter of Dow's speaks of the A. & P. Products Corporation and its fleet, but never was there a mention of Skansi. Concerning this question of mistake, Dow testified:

"Q. Who determined the name of the assured for those fleet policies?

A. Actually agreed between Sargent and I and the A. & P.

Q. And who named the insured? Didn't the A. & P. Products Corporation name the assured?

A. No, not necessarily. I explained the whole situation to Sargent and told him I was compelled to give him that particular line of vessels owned by the A. & P. Products Corporation, in whole or in part, or that may be hereafter chartered or acquired, and it was agreed that everything would be put in the A. & P. Products Corporation's name. All right. It was put through at six per cent. Fredericks comes in and offers it for five and a half, and I go back to Sargent, and he gives us a credit memorandum or a blowback, a difference of one-half of one per cent.

Q. Did you say anything to Sargent at that time that the insurance was to be written upon the 'Companion' with loss payable in favor of John Skansi?

A. Perhaps in a general way, everything was written—

Q. Well, did you give him any instructions to write that policy in the name of John Skansi?

A. Why, no, but I explained to him who owned the vessel.

Q. Did you give him any instructions to write that in the name of John Skansi, either as owner, or otherwise?

A. I advised him what the situation was, and it was mutually agreed between us that it would be written in the name of the A. & P.

Q. Did you give him instructions to write it in the name of John Skansi?

A. Why, yes, qualifiedly. He knew who owned the vessel. He had the survey report.

(Mr. Dow): When I first talked to him about it, I told him then that Skansi owned the 'Companion.' I do not know whether he had the survey of the 'Companion'." (Ap. 70-71)

## It is Immaterial Whether There Was a Mistake in Not Naming John Skansi as a Beneficiary Upon the Issuance of the Policy

The policy was drawn, delivered to Dow in March, by him immediately delivered to the A. & P. Products Corporation, returned to Dow's office, examined by Skansi himself before he went north, and again just before October 19th, at least long enough to see that his name was not in it (Ap. 111), and delivered to Skansi in November (Ap. 63), all of which was prior to the loss on December 30th. There is no evidence

of anyone asking Sargent to correct any errors. Opportunity and time to make changes was full and sufficient. When Skansi received the policy in hand in November, it was his duty to examine it, but there is no evidence that he found any fault; therefore, it must be taken that he accepted it as it was.

IMMATERIALITY RECOGNIZED BY APPELLEE'S COUNSEL

Upon appellant's offer of its Exhibit 5—Dow's letter to Burgard, Sargent, Inc., dated March 11, 1925—appellee objected, saying it was immaterial, and

> "It is a letter written prior to this agreement that we say was made for the endorsement of this policy. * * * If we did not make any agreement here, your Honor, and your Honor cannot find any agreement was made to make the proper endorsement on this policy and change, in September or October of 1925, then we are not entitled to recover. And anything prior to that time seems to me to be immaterial." (Ap. 73)

Later, upon appellant offering its Exhibit 6—Dow's letter to Burgard, Sargent, Inc., dated March 18, 1925—appellee announced:

> "It seems to me the only question involved in this case is this, a policy of insurance was concededly issued by the Globe & Rutgers. We contend that in September or October of 1925, after the charter party had expired, we requested an endorsement on this policy to the effect that the loss was payable to Skansi, the owner, the charter party having expired, and that the vessel might be used on the waters of the Puget Sound. That

if we fail in that, we do not have any case. That is the only issue, your Honor, it seems to me, that is involved." (Ap. 73-74)

IMMATERIAL FOR THE FURTHER REASON—EXPIRATION OF POLICY BEFORE LOSS

The policy as originally written, although apparently for one year, contained the typewritten warranty limiting the use of the vessel to certain waters of Southeastern Alaska, with the privilege of making one round trip between Seattle and policy limits. At the time the policy was written, the vessel was in Seattle. It sailed for the north the latter part of March and returned in July or August of that same year. This completed the one round trip mentioned in the warranty, and automatically the policy expired when the vessel arrived at Seattle.

---

ENDORSEMENT OF OCTOBER 19, 1925, DRAWN PER AGREEMENT—NO MISTAKE

No matter what Dow may have said to Sargent over the telephone, he followed it up by mailing Sargent his letter of October 19, 1925, enclosing Dow's suggested endorsement extending the trading limits to Puget Sound (Appellant's Exhibit 8, Ap. 76). There was no mention herein of Skansi. Appellant's Exhibit 9—a letter from Burgard, Sargent, Inc., to Dow on the same date, returned the endorsement with a suggested change. Appellant's Exhibit 10 was a letter from Dow to Burgard, Sargent, Inc., dated October 20, 1925, transmitting a copy of the endorsement of

October 19th, which was actually attached to the policy. We quote a portion of Dow's testimony:

"I prepared—drafted the endorsement of October 19, 1925. There was no charge by way of premium or otherwise made by the Globe & Rutgers Fire Insurance Company for the endorsement of October 19, 1925.

Q. When you got this endorsement of the 19th of October, 1925, you received from Burgard-Sargent & Company all you asked for at that time?

A. Yes.

Q. The answer is what?

A. Yes.

Q. And there was no mistake then made in the preparation of that endorsement as originally drawn?

A. It was drawn by mutual agreement. No mistake that I know of." (Ap. 76-77)

"There is always a different insurance rate for a fleet. Three or more vessels get a lower rate than one. The reason John Skansi was not named as owner in this endorsement was to get the benefit of the lower rates—fleet rates. I discussed that with Mr. Sargent. Mr. Sargent and I were interested in keeping the business for the Globe & Rutgers.

Q. And the reason for not mentioning John Skansi then was so that you could give a rate that would keep the business from going to some other company or agency; that is true, isn't it?

A. That is very true, so we did not put his name on the policy." (Ap. 78)

Dow later testified:

"There was a mutual agreement as to how the endorsement should be drawn up. That was between Mr. Sargent and myself. Mr. Skansi was not a party to that. When I said there was no mistake as to that endorsement, I meant there was no intentional mistake. The endorsement is not as Mr. Skansi requested it.

"When that endorsement came back, I do not have any definite knowledge that I looked at it. I might have. I had the policy in the office. In the matter of the endorsement, Mr. Skansi wanted to be covered. He asked me to be covered, and I communicated that to Sargent." (Ap. 80)

A few moments later, Dow said:

"Mr. Skansi wanted his boat covered on the Sound, but he did not ask me to have the policy specifically name him as the assured." (Ap. 81)

"The endorsement of October 19th met with my request to Mr. Sargent. As I understand it, the endorsement covered everything asked by Mr. Skansi." (Ap. 82)

These unexpected admissions of Dow caused his cross examination by appellee's attorney, as follows:

"I want to ask you about some of your testimony in October of 1927, in this case. I don't know but what this may be—I am surprised at the witness' testimony, your Honor, that is, taking one conception of it, I am surprised, and taking another, of his understanding, I don't see

that I can be surprised, but I do want to get the matter clear. I don't want to appear to press this matter too far, but I would like to ask the witness this, regarding his testimony in October of 1927, if I may, without being subject to the charge of impeaching my own witness, for the purpose of clarifying.

(Dow): Mr. Skansi said to me 'in substance exactly as the testimony is.'" (Ap. 82)

COMPULSION—THE COURT'S COMMENT AND MEMORANDUM

In denying appellant's motion made at the close of appellee's case, the court said:

"All motions denied. The law is, as the Court understands it, that when you debauch another man's agent, the other man's agent ceases to be the agent of the other man, and becomes your agent. Now, if Dow's testimony is true that Sargent did not leave him as a free agent in the interests of his clients, but held a club over him, and coerced him, or used undue influence to get him to accede to the terms proposed by Sargent, right there he ceased to be the agent of his clients when he yielded to that, and became the agent of Sargent, and Sargent's client." (Ap. 84-85)

The court's memorandum opinion, written at the close of the trial of the so-called equitable action, seems to have been wholly based upon the thought that Dow had been coerced or corrupted, or as he said "debauched," and that by reason thereof, Dow had become the agent of the appellant. The question of

agency came into the matter this way. At the beginning of the trial, appellee introduced John Skansi as his first witness, and immediately endeavored to have him relate conversations between himself and Dow. Objections were promptly made upon different grounds, one of which was that the testimony was hearsay; that Dow was the agent of the assured, and not the agent of the appellant. Later Dow was, by the appellee, put on the stand and asked to relate conversations passing between himself and Skansi. The same objections and motions to strike were made, and rulings reserved until the close of the trial. Being renewed, the court made the comments hereinbefore quoted.

DOW COULD NOT HAVE BEEN THE AGENT OF THE APPELLANT FOR THE REASON THAT HE HAD BEEN GIVEN NO AUTHORITY BY IT AND HELD NO LICENSE FROM THE STATE OF WASHINGTON, AS PROVIDED BY THE STATUTES OF SAID STATE

Sec. 7033—Rem. Comp. Stat.:

> " 'Agent' or 'insurance agent' is a person, copartnership, corporation, attorney, board or committee duly appointed and authorized by an insurance company, to solicit applications for insurance to be known as the soliciting agent, or to solicit applications and effect insurance in the name of the company, to be known as a recording or policy writing agent, and to discharge such other duties as may be vested in or required of an agent by the company."
>
> "Solicitor' or 'Insurance Solicitor' is a person

duly appointed, authorized and employed by a duly commissioned agent to solicit, receive and forward applications for insurance and to collect premiums for the agent."

" 'Broker' or 'Insurance Broker' is any person, copartnership or corporation, who, for compensation, not being an appointed agent for the company in which insurance or reinsurance is effected, acts or aids in any manner in negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a party other than himself or itself."

AGENTS TO PROCURE LICENSE, MUST ACT ONLY FOR ADMITTED COMPANIES

Sec. 7088—Rem. Comp. Stat.:

" * * * No person, firm or corporation shall act as agent for any insurance company, in the transaction of any business or insurance within this state, or negotiate for, or place risks for, any such company, or in any way or manner aid such company in effecting insurance, or otherwise in this state, except as provided in section 7120, unless such company shall in all things have complied with the provisions of this act. Every insurance agent, solicitor or broker shall annually, on or before the first day of April, procure a license from the commissioner who shall make and keep a record thereof. * * *"

Sec. 7120—Rem. Comp. Stat.—(Note) Sec. 7088 refers to Sec. 7120, which latter section refers to un-

authorized companies—agents—surplus line—service, but nevertheless provides:

> "* * * No person, firm or corporation shall place, procure or effect insurance upon any risk located in this state in any company not licensed to do business in this state, or place, procure or effect insurance in any marine risk destined for or departing from any port in this state until such person, firm or corporation shall have first procured a license from the Commissioner as provided in this section, and has furnished a bond to the State of Washington. * * *"

Sec. 7145—Rem. Comp. Stat.:

> "Any person or party who solicits fire, marine, casualty, liability, or surety business to be placed in an insurance company other than represented by him shall be deemed and considered as transacting a brokerage business and shall be required to procure a broker's license: Provided, that nothing in this act shall be considered as prohibiting duly licensed bona fide recording agents from exchanging with each other any of the lines of business enumerated in this section for which such agent is licensed, and paying or dividing commission on business so exchanged."

*Reynolds v. Pacific Marine Ins. Co.*, 105 Wash. 666 (669, *et seq.*);

*Lauridsen v. Bowden, Gazzam & Arnold*, 107 Wash. 310;

*Day v. St. Paul Fire & Marine Ins. Co.*, 111 Wash. 49.

THE COURT'S COMMENTS AND MEMORANDUM CONTINUED

The support for the court's comment is the unsupported testimony of Mr. Dow. In order that there may not be any question as to what Dow said, we quote it as it was given:

> "The Nakat Packing Corporation applied to me for the policy, which is the A. & P. Products Corporation. Mr. Skansi did not see me regarding this policy—only he asked me if the vessel was insured, prior to the vessel going on the charter. The Nakat Packing Corporation applied for the insurance. I called up Mr. Sargent and had him come over to my office. I told Mr. Sargent that I was compelled to give him a certain amount of business, going to split it up among agents, and I gave him a list of all the vessels that the Nakat Packing Company owned, including the chartered vessel, the 'Companion.' That was either in April or March, in 1925." (Ap. 59)

At a later point in his testimony, he said:

> "In 1925, under Mr. Sargent's superior officer, I was forced to give the insurance to them or lose their customs business. In March, 1925, I solicited the insurance of this A. & P. Products Corporation fleet. In addition, Sargent was after the business and Frederick, Johnson & Higgins and Marsh & McLennan.
>
> "Mr. C. A. Burckhardt was one of the principal owners of the Globe & Rutgers Insurance Company which, through the agency of C. A. Burck-

hardt, who was the president and principal owner of the insurance agency of Burgard-Sargent & Company, which I was attempting to buy at one time, he called me over and he said, 'I am operating seven canneries, and you have to do some business with my companies, or I will take the business away from you,' meaning the customs-house business.

Q. So that it was just a pure matter of business. You would not have given this insurance to Burgard-Sargent & Company except to save some customs brokerage business?

A. Assuming the rates were going to be equal to the other rates offered.

Q. And if it had not been for that situation, you would have given the business to somebody else; is that what I understand you to say?

A. Exactly, and the rates.

Q. Yes.

THE COURT: And the rates?

A. The insurance rates, if they were equal, all things being equal, why then naturally I would have to favor Mr. Sargent or lose the custom-house business of his president's canneries.

Q. But so far as the A. & P. Products Corporation was concerned, it was indifferent as to which agency you placed the business with, as long as the rates and terms were satisfactory; is that correct?

A. Invariably, yes, it was left to my judgment. Occasionally there is an exception." (Ap. 68-69)

Later he testified:

"Q. Who determined the name of the assured for those fleet policies?

A. Actually agreed between Sargent and I and the A. & P.

Q. And who named the insured? Didn't the A. & P. Products Corporation name the assured?

A. No, not necessarily. I explained the whole situation to Sargent and told him I was compelled to give him a certain line of business, and I was going to give him that particular line of vessels owned by the A. & P. Products Corporation, in whole or in part, or that may be hereafter chartered or acquired, and it was agreed that everything would be put in the A. & P. Products Corporation's name. All right. It was put through at six per cent. Fredericks comes in and offers it for five and a half, and I go back to Sargent, and he gives us a credit memorandum or a blow-back, a difference of one-half of one per cent." (Ap. 70)

Mr. Burckhardt appeared, upon which there was read to him the following testimony of Dow:

"A. Mr. C. A. Burckhardt was one of the principal owners of the Globe & Rutgers Insurance Company, which, through the agency of C. A. Burckhardt, who was the president and principal owner of the insurance agency of Burgard-Sargent & Company, which I was attempting to buy at one time, he called me over and said, 'I am operating seven canneries, and you have to do some business with my companies, or I will

take the business away from you,' meaning the customs-house business." (Ap. 93)

upon which he testified:

"I never made any such statement to Mr. Dow, or any statement of like effect or like tenor. As a matter of fact, he has had our business continuously from 1924 when he went into business, until this date. I did not have any conversation with Mr. Dow in connection with the A. & P. Products Corporation fleet insurance in 1925. I didn't know that Burgard, Sargent & Company wrote the business. The first time I knew it was this morning when you spoke to me about this case. The first time I heard about this case was last evening when you phoned me to come over here as a witness, and then I thought it was some other company. This is the first time I ever heard of the 1925 fleet insurance of the A. & P. Products Corporation." (Ap. 93-94)

Previous to that he had testified that his principal businesses were other than that of Burgard, Sargent, Inc., of which he was the nominal head, and had but one-tenth interest therein; that the active management of the business was in the hands of Sargent.

The lower court evidently did not have in hand a stenographic statement of Mr. Burckhardt's testimony. Much was made of the reference to reciprocity. An examination of the cross examination shows that in order to directly analyze or understand just what he did say, the brief reference to reciprocity must not be taken from the context. The whole must be read; otherwise a false impression is apt to be had.

The questions to the witness were so framed as to be likely to produce error, and were made to relate to business generally and not to the A. & P. Products Corporation insurance. The witness answered accordingly, but the Court mistakenly thought he was referring to the A. &. P. Products Corporation insurance. The error is easily seen when we note that the witness had just concluded saying:

> "This is the first time I ever heard of the 1925 fleet insurance of the A. & P. Products Corporation." (Ap. 94)

Whatever conversation Dow and Burchardt had concerning reciprocity was had at a time when Dow was contemplating going into business for himself (Ap. 94). If we examine Dow's testimony, we find that he went into business for himself five years before the trial of the action (Ap. 67). The reference to reciprocity, therefore, antedating by several years the A. & P. Products Corporation 1925 insurance, had no connection therewith.

From the foregoing, we maintain that Burckhardt's denials of Dow's testimony were full and complete in every particular.

### The Agent, Dow, Could Not be Debauched Under the Circumstances, and in the Manner Asserted

The debauching of an agent presupposes that thereby the interest of the agent is made adverse to that of his principal. In the present case, Dow began the 1925 season without any authority whatever to represent the A. & P. Products Corporation in the matter

of the placement of its fleet insurance, so he solicited it and testified that he had to submit a proposition to the A. & P. Products Corporation, and the placement of the insurance was governed primarily by the rates, terms and conditions of the insurance which had to be made satisfactory to the assured. Nothing was left to the decision of Dow, except the selection of the insurance company. In the present case many agents were after the business, but in the end Sargent's rates, terms and conditions were not bettered by anyone, and Frank Frederick was the only one offering this insurance at the same rate. It follows, therefore, that Dow was obliged to place this insurance with either Frederick or Sargent. The threat under the circumstances could not have exercised an influence upon Dow to the detriment or damage of the principal, and so lacking in that element, the threat was without force or effect. True, it may have caused Dow to give the business to Sargent rather than to Frederick, but that did not matter, for the reason that the principal was only interested in the rates, terms and conditions.

Even if Burckhardt made the threat charged by Dow, it does not appear that the same had any influence upon him adverse to his principal, because Dow, in his opening letter to Sargent in January, 1925, announced to him:

> "I told Mr. Sargent that I was compelled to give him a certain amount of business, going to split it up among agents, and I gave him a list of all the vessels that the Nakat Packing Company owned, including the chartered vessel 'Companion'." (Ap. 59)

This letter clearly indicates that Dow did not at that time consider himself under any compulsion to give Sargent the A. & P. Products Corporation business, because he announced that he was going to split it up among agents, and the word "compelled," as it is used in the letter, rather indicates a facetious use than an expression of regret or a declaration of war. If Burckhardt had made a demand of Dow that he give Burgard, Sargent, Inc., the insurance at a rate higher than the lowest offered, or upon any unfavorable term or condition, the situation might have been different, but in this case the demand was free from possible damage or detriment to the principal. Therefore, the claimed threat, even if made, cannot be said to have been equivalent to corruption or debauchery.

Herewith follows Dow's testimony showing his limitations as an agent, and the utter failure of the claimed threat to have any influence upon him:

> "I could not place this particular insurance 'at any old rates or any old conditions.' I had to submit a proposition. There was a contest on here in Seattle at the time between various agents for the writing of that business. Frank Frederick, representing other companies, was contesting for the business, and the rate was being cut down from day to day between these companies. Frederick would offer one rate; Sargent would offer another. Some of these offers were made to me and Frederick went direct to my clients, although I had been previously giving him a lot of business. This group of vessels was being handled for the purpose of insurance as a

fleet, this being the basis upon which we were able to cut the rates down." (Ap. 66)

"It was put through at six per cent. Fredericks comes in and offers it for five and a half, and I go back to Sargent, and he gives us a credit memorandum or a blow-back, a difference of one-half of one per cent." (Ap. 70)

After relating that under Mr. Sargent's superior officer, he was forced to give the insurance to them or lose their customs business, he was asked:

"Q. So that it was just a pure matter of business. You would not have given this insurance to Burgard-Sargent & Company except to save some customs brokerage business?

A. Assuming the rates were going to be equal to the other rates offered.

Q. And if it had not been for that situation, you would have given the business to somebody else; is that what I understand you to say?

A. Exactly, and the rates.

Q. Yes.

THE COURT: And the rates?

A. The insurance rates, if they were equal, all things being equal, why then naturally I would have to favor Mr. Sargent or lose the customs-house business of his president's canneries.

Q. But so far as the A. & P. Products Corporation was concerned, it was indifferent as to which agency you placed the business with, as long as the rates and terms were satisfactory; is that correct?

A. Invariably, yes, it was left to my judg-

ment. Occasionally there is an exception." (Ap. 68-69)

We respectfully submit that the appellee has failed in every particular to meet his burden of proof.

COSGROVE & TERHUNE,
*Attorneys for Appellant.*

Howard T. Cosgrove